

RECORD NO. 12-1671

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In The  
**United States Court of Appeals**  
For The Fourth Circuit

**BOBBY BLAND; DANIEL RAY CARTER, JR.;**  
**DAVID W. DIXON; ROBERT W. MCCOY;**  
**JOHN C. SANDHOFER; DEBRA H. WOODWARD,**

*Plaintiffs – Appellants,*

v.

**B. J. ROBERTS, individually and in his official capacity as**  
**Sheriff of the City of Hampton, Virginia,**

*Defendant – Appellee.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT**  
**FOR THE EASTERN DISTRICT OF VIRGINIA**  
**AT NEWPORT NEWS**

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**BRIEF OF APPELLANTS**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 12-1671 Caption: Bland, et al v. B. J. Roberts, etc.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Appellants who is, makes the following disclosure:
(name of party/amicus) (appellant/appellee/amicus)

- 1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
5. Is party a trade association? (amici curiae do not complete this question) YES NO
6. Does this case arise out of a bankruptcy proceeding? YES NO

CERTIFICATE OF SERVICE

\*\*\*\*\*

I certify that on this date I served this document on all parties as follows:

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## **JURISDICTIONAL STATEMENT**

This is an appeal from a final Order and Judgment of the United States District Court for the Eastern District of Virginia entered on April 24, 2012, granting summary judgment to Sheriff B. J. Roberts (“Roberts”) and disposing of all claims asserted by four of his former Deputy Sheriffs and two civilian employees. The Appellants, Bobby Bland (“Bland”), Daniel Ray Carter, Jr. (“Carter”), David W. Dixon (“Dixon”), Robert W. McCoy (“McCoy”), John C. Sandhofer (“Sandhofer”) and Debra H. Woodward (“Woodward”), sued Roberts in his individual and official capacities alleging that he violated Appellants’ First Amendment rights to freedom of speech and freedom of association when he fired them for opposing his re-election to office in 2009. The Appellants filed suit on March 4, 2011 invoking the jurisdiction of the District Court pursuant to 28 U.S.C. §§ 1331, 1343 and 1367 as well as 42 U.S.C. § 1983. Appellants timely filed their Notice of Appeal on May 22, 2012, and invoke this Court’s jurisdiction under 28 U.S.C. § 1291.

## **STATEMENT OF THE ISSUES**

1. Does a genuine issue of material fact exist as to whether Carter, Dixon, McCoy and/or Woodward engaged in speech protected by the First Amendment?
2. Does a genuine issue of material fact exist as to whether the Appellants, or any one of them, politically affiliated with Sheriff Roberts’ political opponent in the election held November 3, 2009, or

refused to affiliate with Sheriff Roberts' political campaign, in a manner giving rise to protection under the First Amendment?

3. Does a genuine issue of material fact exist as to whether Sheriff Roberts unlawfully retaliated against the Appellants, or any one of them, when he terminated their employment shortly after the election?
4. Whether Sheriff Roberts is entitled to qualified or Eleventh Amendment immunity?

### **STATEMENT OF THE CASE**

The Appellants alleged that Sheriff Roberts discharged them because they failed to associate with his political campaign and because certain of them actively spoke in favor of his opponent or against his re-election effort in 2009. The allegations state two separate First Amendment claims, each of which, standing alone, entitle the Appellants asserting them to relief: 1) political affiliation claims under *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980) and 2) claims for protected employee speech on a matter of public concern under *Pickering v. Board of Education of Township High School District*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). The first claim is asserted by all Appellants. The latter claim is asserted by Carter, Dixon, McCoy and Woodward, but not Sandhofer and Bland.

Four of the Appellants (Carter, McCoy, Dixon and Sandhofer) were uniformed deputies. Two of the Appellants (Bland and Woodward) were administrative civilian employees. The deputies were not law enforcement



officers. Three (Carter, McCoy and Dixon) were jailors. One (Sandhofer) was a civil process server. None of the Appellants had leadership responsibility, policy-making responsibility, or responsibility for speaking for the Sheriff. The Appellants were not confidants of the Sheriff or custodians of confidential information.

For years, Roberts has nurtured a culture within the Hampton Sheriff's Office pursuant to which political loyalty and political support is demanded of employees. Political opposition is not tolerated. Sheriff Roberts was up for re-election on November 9, 2009, against a former senior officer within the Hampton Sheriff's Office, Jim Adams ("Adams"). During the campaign leading up to that election, Appellants Carter and McCoy recorded statements on Adams' campaign Facebook page indicating their support for him. Dixon verbally indicated his support of Adams at the polls on November 9, 2009 in front of Sheriff's Office employees loyal to Roberts. Woodward openly protested when a lieutenant within the Hampton Sheriff's Office circulated petitions in support of Roberts. All of the Appellants had affiliated with Sheriff Roberts' political campaigns in the past by performing various acts of support for him, but openly refused to provide this support during the campaign of 2009.

The Appellants were fired immediately after the 2009 election. All of the Appellants had excellent performance records while many employees who were

retained by Roberts had marginal or poor performance records. There is significant evidence in this record that Sheriff Roberts' decision to fire the Appellants was the result of retaliatory animus arising from the Appellants' expressions of support for Adams, their affiliation with Adams and their refusal to affiliate with and support Sheriff Roberts.

On December 9, 2011, Roberts moved for summary judgment. The District Court entered judgment granting Sheriff Roberts' Motion for Summary Judgment as to all claims on April 24, 2012.

### **STATEMENT OF FACTS**

1. In November 2009, Sheriff Roberts was up for re-election for the office of Sheriff of the City of Hampton, Virginia, having served in the office for the previous seventeen years. Complaint (J.A. 10-13).

2. In early 2009, Jim Adams announced that he would oppose Sheriff Roberts in the general election to be held that November. Adams was generally considered to be a credible opponent, as he had held a very high-ranking position in the Hampton Sheriff's Office for sixteen years and resigned his position in January 2009 to run against Sheriff Roberts. At the time of his resignation, Adams was the lieutenant colonel within the office and the third most senior officer. *Id.*

3. At all times relevant to this matter, the Hampton Sheriff's Office was organized in a fashion similar to military or police organizations. The Sheriff's

Office employed more than one hundred and forty sworn deputies and non-sworn administrative personnel. The Sheriff was the most senior executive officer within the organization and was responsible for all facets of its operation, including the hiring and firing of employees. He is elected every four years in accordance with the Constitution and laws of Virginia and is accountable only to the electorate. *Id.*

4. Colonel Karen Bowden was the second most senior officer in the Hampton Sheriff's Office and was responsible for the Sheriff for all aspects of its operation. *Ex. 2, Bowden Dep., p. 5 (JA 444).*

5. The Sheriff was assisted by other senior officers who were appointed solely by him and served at his pleasure. These senior officers included two majors, two captains, and several lieutenants. Roberts demanded and received absolute political loyalty from these senior officers within his office. Complaint (J.A. 10-13).

**A. Nature of Appellants' Employment.**

1. Sheriff Roberts did not have responsibility for law enforcement in the City of Hampton at any time relevant to this matter. *Ex. 1,*<sup>1</sup> Sheriff Roberts Deposition ("Roberts' Dep.") 11-12, 18 (J.A. 290-291, 297.)

2. Under Virginia law, in order for a Deputy Sheriff to function as a law enforcement officer they must attend the Virginia Department of Criminal Justice

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<sup>1</sup> "Ex." shall refer to Exhibits submitted with Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment (J.A. 247).

Services' ("DCJS") "Basic Law Enforcement" course. *Ex. 1*, Roberts Dep. 11-12, 18 (J.A. 290-291, 297); *Ex. 2*, Bowden Dep., 17-18 (J.A. 456-457); *Ex. 3*, Adams Declaration ("Dec.") ¶ 4 (J.A. p. 516), *Ex. 4*, 6 VAC 20-20-30 (J.A. 518-546), Va. Code §§ 9.1-101 & 102. None of Sheriff Roberts' employees attended the "Basic Law Enforcement" course. *Ex. 1*, Roberts Dep. 11, 12-18 (J.A. 290-297); Carter Dec. ¶ 3 (J.A. p. 568); *Ex. 7*, Dixon Dec. ¶ 3 (J.A. pp.579-580); *Ex. 8*, McCoy Dec. ¶ 3 (J.A. 584-585); *Ex. 9*, Sandhofer Dec. ¶ 3 (J.A. p. 590). Accordingly, none of them were law enforcement officers. *Id.*; *Ex. 3*, Adams Dec. ¶¶ 2-5 (J.A. 515-516).

3. In Sheriff Roberts' own way of saying it: "If you are to patrol and have immediate arrest powers, you have to go to the law enforcement academy." *Ex. 1*, Roberts Dep. 11-12, 18 (J.A. p. 297). He then confirmed that his employees did not attend the law enforcement academy. *Id.*

4. Two general curricula are offered by the DCJS. The "Basic Law Enforcement" course and the "Basic Jailor and Court Services" course. *Id.* (J.A. 290-291, 297). The Basic Law Enforcement course offered by DCJS is far more exacting and is approximately twice as long as the Basic Jailor course. *Ex. 2*, Bowden Dep. 17-18 (J.A. 456-457). The Appellants (excluding Bland and Woodward who were civilian employees) attended the Basic Jailor, not the Basic Law Enforcement Course. *Ex. 1*, Roberts Dep. 11-12, 18 (J.A. 290-291, 297).

5. Because they do not attend the Basic Law Enforcement Course, Sheriff Roberts' deputies do not have "general powers" of "immediate arrest," however, under Hampton Sheriff's Office Policy No. 602, Deputy Sheriffs may make arrests for "blatant" violations that occur "in their presence." The Policy states in part:

[T]he Hampton Police Division is the primary law enforcement agency that is charged with the responsibility of handling adult and juvenile offenders. However, when violations are committed *in the presence* of deputies they are bound by oath of office to identify, apprehend, arrest and seek to convict all adults who have violated the laws of the Commonwealth of Virginia . . . .

The Hampton Sheriff's Office is not the primary law enforcement agency for the City of Hampton *and does not routinely intervene in law enforcement*, however, deputies are bound to act under *blatant violations* and the following guidelines are offered. . . .

*See* Hampton Sheriff's Office Policy No. 602, *Ex. 5* (J.A. 547-566) (emphasis added).

6. Three of the Appellants in this action (Dixon, Carter and McCoy) were employed at the time of their terminations as jailors, their section was known within the Hampton Sheriff's Office as the Corrections Division. *Ex. 6*, Carter Dec. ¶ 2 (J.A. p.567); *Ex. 7*, Dixon Dec. ¶ 2 (J.A. p. 579); and *Ex. 8*, McCoy Dec. ¶ 2 (J.A. p.584). One of the Appellants (Sandhofer) was employed as a civil process server in the Hampton Sheriff's Office Civil Process Division at the time of his termination, but had spent most of his time in the office as a jailor. *Ex. 9*,

Sandhofer Dec. ¶ 2 (J.A. p. 589). Two of the Appellants (Bland and Woodward) were employed in non-uniformed, non-sworn administrative positions. *Ex. 11*, Woodward Dec. ¶ 2 (J.A. p. 598).

7. The Appellants' job descriptions are provided as *Ex. 12* (Corrections: Carter, Dixon, McCoy) (J.A. 602-603), *Ex. 13* (Civil Process: Sandhofer) (J.A. 604-605), *Ex. 14* (Training: Woodward) (J.A. 606-607), and *Ex. 15* (Finance: Bland) (J.A. 608-609).

8. None of the Appellants have ever arrested anyone while employed in the Hampton Sheriff's Office. *Ex. 6*, Carter Dec. ¶ 2-3 (J.A. 567-568); *Ex. 7*, Dixon Dec. ¶ 2-3 (J.A. p. 579); *Ex. 8*, McCoy Dec. ¶ 2-3 (J.A. 584-585); *Ex. 9*, Sandhofer Dec. ¶ 2 (J.A. p. 589); *see also* Adams Dec. (J.A. 515-516); Declarations of Darling (J.A. 792-794), Mitchell (J.A. 795-796) and Wheeler (J.A. 1082-1083). None of the Appellants were ever aware that they had such power and were generally under the impression that they did not. *Id.*

9. For at least the last sixteen years, there has been no known instance of anyone within the Hampton Sheriff's Office making an arrest. *Ex. 3*, Adams Dec. ¶ 5 (J.A. 516.)

10. The Appellants had no leadership responsibility, policy-making responsibility or responsibility for speaking for the Sheriff when they were employed by the Hampton Sheriff's Office. *Ex. 6*, Carter Dec. ¶ 2-3 (J.A.

567-568); *Ex. 7*, Dixon Dec. ¶ 2-3 (J.A. p. 579); *Ex. 8*, McCoy Dec. ¶ 2-3 (J.A. 584-585); *Ex. 9*, Sandhofer Dec. ¶ 2-3 (J.A. 589-590); *Ex. 10*, Bland Dec. ¶ 2-4 (J.A. 595-596); *Ex. 11*, Woodward Dec. ¶ 2-4 (J.A. 598-599); *Ex. 12*, Corrections Job Description (J.A. 602-603); *Ex. 13*, Civil Process Job Description (J.A. 604-605); *Ex. 14*, Training Job Description (J.A. 606-607); and *Ex. 15*, Finance Job Description (J.A. 608-609). None of the Appellants was ever consulted about Hampton Sheriff's Office Policy. *Id.*

11. The jailor's position held by Carter, McCoy and Dixon was purely custodial in nature. *Ex. 6*, Carter Dec. ¶¶ 2-3 (J.A. 567-568); *Ex. 7*, Dixon Dec. ¶¶ 2-3 (J.A. 579); *Ex. 8*, McCoy Dec. ¶¶ 2-3 (J.A. 584-585); *Ex. 12*, Corrections Job Description (J.A. 602-603). They worked exclusively in the Hampton jail. *Id.* The civil process position held by Sandhofer was routine and ministerial. *Ex. 9*, Sandhofer Dec. ¶¶ 2-3 (J.A. 589-590); *Ex. 13*, Civil Process Job Description (J.A. 604-605).

12. The Appellants were not confidants of the Sheriff or custodians of confidential information when they were employed by his office. *Ex. 6*, Carter Dec. ¶ 2-3 (J.A. 567-568); *Ex. 7*, Dixon Dec. ¶ 2-3 (J.A. p. 579); *Ex. 8*, McCoy Dec. ¶ 2-3 (J.A. pp.584-585); *Ex. 9*, Sandhofer Dec. ¶ 2-3 (J.A. 589-590); *Ex. 10*, Bland Dec. ¶ 2-4 (J.A. 595-596); *Ex. 11*, Woodward Dec. ¶ 2-4 (J.A. 598-599).

**B. Sheriff's Intolerance for Political Opposition and Knowledge of Appellants' Statements and Affiliations.**

1. Sheriff Roberts created a culture where he and his most senior staff, while at work and during work hours, routinely approached employees and solicited them to provide support for the Sheriff's re-election efforts or exhorted them to support the Sheriff politically. *Ex. 6*, Carter Dec. ¶¶ 12-16 (J.A. 570-571); *Ex. 7*, Dixon Dec. ¶¶ 13-14 (J.A. 586-587); *Ex. 8*, McCoy Dec. ¶¶ 13-14 (J.A. 586-587); *Ex. 9*, Sandhofer Dec. ¶¶ 13, 15 (J.A. p. 592); *Ex. 10*, Bland Dec. ¶ 8 (J.A. 596); *Ex. 11*, Woodward Dec. ¶¶ 7-9 (J.A. 600); *Ex. 17*, Jones Dec. ¶¶ 3-5 (J.A. 701-702); *Ex. 20*, Darling Dec. ¶¶ 4-7 (J.A. 792-794); *Ex. 21*, Mitchell Dec. ¶¶ 3-5 (J.A. 795-796); *Ex. 22*, Coronado Dec. ¶¶ 4-7 (J.A. 797-798); *Ex. 24*, Davis Dec. ¶¶ 4-5 (J.A. 890-891); *Ex. 28*, Wheeler Dec. ¶¶ 3-5 (J.A. 1082-1083).

Despite laws and regulations<sup>2</sup> restricting use of public assets and employees while on public paid status, Sheriff Roberts made the public resources available within his office his own for political purposes, including his employees' work time paid for by taxpayers. *Id.*

2. Sheriff Roberts held campaign meetings at the Sheriff's office during the work day. *Id.* The seminal meetings in this case, discussed *infra*, at which Sheriff Roberts exhorted his employees not to get on Facebook supporting Adams

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<sup>2</sup> See *Commonwealth of Virginia Political Activity Policy*, *Ex. 30*, p. 28. (J.A. 1113), the Hatch Act, 5 U.S.C. § 7321, *et seq.*, and Declaration of Deborah Davis (J.A. 890-892).



were – every one of them – “on the clock.” *Id.* He used office copiers and computers to create campaign-related documents. *Id.* He used Sheriff’s Office employees, while on the clock, to work his annual barbeque/golf tournament political fund-raising event. *Id.* Senior staff solicited employee help with Sheriff Roberts’ re-election efforts at work. *Id.* Some of them admitted it. *See, e.g., Ex.16*, McGee Dep. p. 77 (J.A. p. 686) (Captain McGee: “I spoke to Sheriff’s employees about supporting the Sheriff” and “I asked employees ‘to support the Sheriff. And if you can’t support the Sheriff, then just be neutral.’”)<sup>3</sup>.

3. Sheriff Roberts’ senior staff tracked, noted and monitored both the levels of political support provided by employees as well as any reluctance to provide support and signs of opposition. *Ex. 17*, Larkin Dec., ¶¶ 4-5 (J.A. p. 702) (Major Richardson interrogating Larkin about who attended a cookout thought to be a political event); *Ex. 18*, Richardson Dep. p. 56 (J.A. p. 760) (Major Richardson: “[I] had a roster, and I just give *everybody* five tickets and ask them to go ahead and sell the tickets for me”) (emphasis added); *Ex. 2*, Bowden Dep. 43-44 (J.A. 782-483), Defendant’s Memorandum ¶ 10, p. 5 (J.A. p. 39) (Col. Bowden learned of Deputy Carter and Deputy McCoy on Jim Adams’ Facebook

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<sup>3</sup> Captain McGee also testified as follows: Q. How about the Sheriff himself? Did you ever hear the Sheriff himself say that? A. He probably said that at the meeting. Something to that effect.

page from Major Belinda Wells-Major<sup>4</sup> and when she learned of this fact she told the Sheriff.); *Ex. 1*, Sheriff Roberts Dep. 114-115 (J.A. 393-394) (learned of the cookout thought to be a political event attended by Adams from Col. Bowden); *Id.*; *Ex. 2*, Bowden Dep. 58-59 (J.A. 497-498) (the senior officers within the Hampton Sheriff's Office assisted in the Sheriff's 2009 re-election effort and solicited employees' involvement); *Ex. 16*, McGee Dep. 74-75 (J.A. 683-684) (the cookout with Adams in attendance and photos of the event came to light in the early fall of 2009).

4. In late summer of 2009, before Sheriff Roberts was to stand for re-election in November, Appellants Carter and McCoy made statements on Jim Adams' campaign Facebook page indicating their support of Adams' campaign for Sheriff. *Ex. 6*, Carter Dec. ¶ 9-11 (J.A. 569-570); *Ex. 8*, McCoy Dec. ¶ 10 (J.A. p. 586); *Ex. 1*, Roberts Dep. 103-104, 106 (J.A. 382-387); *Ex. 2*, Bowden Dep. 43-44 (J.A. 482-483); *Ex. 16*, McGee Dep. 71-72 (J.A. 680-681).

5. The evidence in the record is such that there can be no doubt that Carter's *and* McCoy's presence on Adams' campaign Facebook page clearly evinced, and was understood by the Sheriff and his senior staff as evincing, their support for Adams. *Id.*, see also *Ex. 2*, Bowden Dep. 43 (J.A. 482); *Ex. 16*, McGee

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<sup>4</sup> Major Belinda Wells-Major was in charge of the Hampton Sheriff's Office Support Services Division.

Dep. 71-72, 85-86 (J.A. 680-681, 694-695); *Ex. 21*, Mitchell Dec. ¶ 4 (J.A. 496);  
*Ex. 22*, Coronado Dec. ¶ 6 (J.A. 498); *Ex. 20*, Darling Dec. ¶ 7 (J.A. 793).

6. Colonel Bowden, among others, testified as follows in her deposition:

Q. Okay. Do you remember there coming a time when it was learned that Danny Carter was on Facebook **supporting** Jim Adams? (emphasis added) A: Yes.

*Ex. 2*, Bowden Dep. at 43 (J.A. 482) (emphasis added).

She learned about McCoy being on Adams' Facebook page at the same time. *Id.*

7. Captain Robert McGee ran the Court Services/Civil Process Division within the Hampton Sheriff's Office. His testimony regarding Jim Adams' Facebook page is illuminating:

Q: Did there ever come a time in 2009 when you learned that Danny Carter was on Jim Adams' Facebook page basically **supporting** Jim Adams for Sheriff? (emphasis added)

A. Yes.

Q. How did you learn about that?

A. It was told to me by one of the supervisors in the division [Sgt. Ford]

...

Q. Did you have – ever have any discussions with anyone else about the fact that either Danny Carter or Wayne McCoy<sup>5</sup> were on Jim Adams' campaign Facebook page?

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<sup>5</sup> Robert McCoy is known to many by his middle name, Wayne.

A. I believe it was Lt. Harding.

Q. And what conversations – what did you say to Lt. Harding?

A. She was there, I believe, when Sgt. Ford had told me. We were together.

Q. What did Lt. Harding have to say about it?

A. Everyone was basically shocked that *they* would put a photo up on the website.

Q. Why was everyone shocked about that?

A. Basically, that *they appeared not to be supporting the Sheriff.*

*Ex. 16, McGee Dep. 71-72 (J.A. 680-681) (emphasis added)*

8. The District Court judge held that there was no evidence that McCoy was ever on Facebook supporting Adams' campaign. This is not correct. First, McCoy's declaration states he did support Adams' campaign on Facebook. *Ex. 8, McCoy Dec. ¶ 10 (J.A. 586)*. Second, when McGee testified "*they* appeared not to be supporting the Sheriff" he was explicitly referring to Carter's *and* McCoy's Facebook posts. Third, Carter saw McCoy's post in support of Adams on Facebook as did other Appellants. *Ex. 6, Carter Dec. ¶ 16 (J.A. 571)*.

9. Col. Bowden informed Sheriff Roberts of Carter *and* McCoy having posted supporting statements on Jim Adams' campaign Facebook page in the fall of 2009, prior to Election Day, but she does not remember the exact time. *Ex. 2,*

Bowden Dep., 43-45 (J.A. 482-484); see also Defendant's Memorandum in Support of Summary Judgment, ¶ 10, 5 (J.A. p. 39). These postings were reported to Bowden by Major Belinda Wells-Major. *Ex. 2*, Bowden Dep. 43-44 (J.A. 482-483).

10. Col. Bowden acknowledges that she monitored Adams' campaign Facebook page during the campaign. *Ex. 2*, Bowden Dep. 45-46 (J.A. 484-485).

11. In late August, 2009, Danny Carter co-hosted a cookout at Buckroe Beach in Hampton with Ramona Jones (formerly Ramona Larkin), another deputy within the Hampton Sheriff's Office. *Ex. 6*, Carter Dec. ¶ 8-11 (J.A. 569-570). *Ex. 17*, Larkin Dec. ¶ 5 (J.A. p. 702). The cookout occurred just before the Labor Day weekend and the traditional "kick off" of the final stretch of the 2009 election cycle. Carter invited Jim Adams to the cookout. *Id.*

12. Upon Jones' return to work the Monday after the cookout, she was approached by her supervisor, Lt. Crystal Cooke, who stated to her "I heard Jim Adams was at your cookout" or words to that effect. *Ex. 17*, Jones Dec. ¶ 3 (J.A. 701). Jones acknowledged to Cooke that Adams had been present and that he had been invited by Carter. *Id.*

13. Shortly after Jones' conversation with Lt. Cooke, Jones was approached by Major (then Captain) Kenneth Richardson. *Ex. 17*, Jones Dec. ¶ 4 (J.A. 702). Richardson inquired as to who attended the cookout, and Jones

confirmed that Jim Adams was there. *Id.* Major Richardson stated to Jones that the cookout had the “appearance of a campaign event” and stated specifically that “it does not look good”. *Id.* Major Richardson informed Jones that she needed to explain to the Sheriff that Carter had invited Adams, not her. *Ex. 17*, Jones Dec. ¶ 5 (J.A. 702).

14. Three of the six Appellants in this action, Deputies Carter, McCoy and Sandhofer, attended the cookout at which Adams was present in late August, 2009. *Ex. 6*, Carter Dec. ¶ 8-12 (J.A. 569-571); *Ex. 8*, McCoy Dec. ¶ 9 (J.A. 585); *Ex. 9*, Sandhofer Dec. ¶ 9 (J.A. 591). Pictures of the event showing Sandhofer and McCoy in attendance were posted on Facebook in late summer or early fall, 2009 (J.A. 703-704). *Ex. 8*, McCoy Dec. ¶ 9 (J.A. 585-586); *Ex. 9*, Sandhofer Dec. ¶ 9 (J.A. 591), *Ex. A* to Sandhofer Dec. (J.A. 593-594). Sheriff Roberts clearly learned of the cookout and Adams’ attendance shortly after it occurred. *Ex. 1*, Roberts Dep. 114-115 (J.A. 393-394). The Sheriff learned this from Col. Bowden. *Id.*

15. It is clear from the admissions of Major Richardson, Captain McGee, the Sheriff and Col. Bowden, that news of Carter and McCoy being on Facebook and Jim Adams attending the cookout discussed above, was not only made known to the Sheriff and Hampton Sheriff’s Office senior staff, but caused a great deal of discussion among them. *Ex. 1*, Roberts Dep. 103-104, 114-115 (J.A. 383-384,

393-394); *Ex. 2*, Bowden Dep. 43-44 (J.A. 482-483); *Ex. 16*, McGee Dep. 71-72 (J.A. 680-681); *Ex. 17*, Larkin Dec. ¶¶ 4-5 (J.A. p. 702).

16. In early September of 2009, the Sheriff made a speech that was repeated to three shift changes of correctional deputies and to at least one additional meeting of court service and administrative employees. *Ex. 22*, Coronado Dec. ¶ 6 (J.A. p. 798); *Ex. 20*, Darling Dec. ¶ 7 (J.A. p. 793); *Ex. 21*, Mitchell Dec. ¶ 4 (J.A. p. 496); *Ex. 6*, Carter Dec. ¶ 16-18 (J.A. 571-572); *Ex. 7*, Dixon Dec. ¶ 14 (J.A. p. 582); *Ex. 8*, McCoy Dec. ¶ 14 (J.A. p. 587); *Ex. 9*, Sandhofer Dec. ¶ 15 (J.A. p. 592); *Ex. 28*, Wheeler Dec. ¶ 5 (J.A. p. 1083). There is overwhelming evidence in the record that he made the following statements or statements substantially similar to the following at the meetings:

- a) “Don’t be getting on Facebook supporting my opponents.” *Id.*
- b) “I am going to have this job as long as I want it.” *Id.*
- c) “My train is the long train.” *Id.*
- d) “If you want to get on the short train with the man I fed for 16 years, you’re going to be out of here.” *Id.*
- e) “This is a bad economy and people are knocking down my door for these jobs.” *Id.*

17. It was clear to many witnesses that when Sheriff Roberts gave the speech outlined above to Carter’s shift change he appeared to be angry. *Id.* At the conclusion of the speech, before Carter’s shift change, he made a direct and angry

approach to Carter and led him outside. *Ex. 6*, Carter Dec. ¶16-18 (J.A. 57-572); *Ex. 21*, Mitchell Dec. ¶ 3-4 (J.A. 795-796); *Ex. 19*, Richardson Dep. 74-75 (J.A. 778-779.) While the only witnesses to the content of the conversation were Sheriff Roberts and Carter, it was clear to other witnesses that the exchange was an angry one. *Id.* The Sheriff proceeded to berate Carter about the Facebook entry in support of Adams and concluded the conversation by saying to him “You’ve made your bed, now you’re going to lie in it, after the election you’re out of here.” *Ex. 6*, Carter Dec. ¶ 16-18 (J.A. 571-572).

18. Sheriff Roberts testified that he fired Dixon because Dixon allegedly said to Frances Pope, one of Sheriff Roberts’ employees and a poll worker for the Sheriff on Election Day, referring to Sheriff Roberts’ campaign material: “You can throw that fucking shit away.” *Ex. 1*, Roberts Dep. 126-127 (J.A. 405-406). The Sheriff made it clear that his reason for the firing was Dixon’s alleged use of foul language.<sup>6</sup> *Id.* Sheriff Roberts’ testimony clearly demonstrates that he was aware of Dixon’s opposition to him. *Id.* But the invective contained within the alleged statement is made up from whole cloth. *Ex. 22*, C. Coronado Dec. ¶ 7 (J.A. p. 798); *Ex. 29*, K. Coronado Dec. ¶ 2 (J.A. p. 1084). Krystal and Cayetano Coronado were at the polling station at the exact time this occurred. *Id.* As the Coronados left the voting location, Pope stated to the Coronados, “You are not

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<sup>6</sup> There is no testimony in this record from Frances Pope, or anyone present, indicating that Dixon used foul language.



going to believe what Dixon said. He told me that I could throw that stuff away.”

*Id.* Pope was plainly referring to Sheriff Roberts’ campaign literature that she was handing out. *Id.* The Coronados report that Pope was very animated when she reported this and incredulous that Dixon vocalized his support for Adams. *Id.* She did not relate that Dixon used any type of expletives or obscene language. *Id.*

19. Neither Sheriff Roberts nor any of his subordinates bothered to investigate Dixon’s alleged use of expletives or foul language. *Ex. 1*, Roberts Dep. 126-127 (J.A. 405-406). No one even bothered to ask Dixon about the incident before he was fired. *Id.*

20. Dixon also had a bumper sticker on his car supporting Adams. Opinion. ¶ 7 (J.A. 1160).

21. In early 2009 campaign petitions were being circulated in order to place candidates’ names on the ballot for the November election. Lt. George Perkins within the Hampton Sheriff’s Office was circulating such a petition on behalf of Sheriff Roberts. *Ex. 11*, Woodward Dec. ¶ 7 (J.A. p. 600). Appellant Woodward believed this to be unlawful and protested Perkins’ activity to Perkins and to Sgt. John Meyers and Sgt. Sharon Mays. *Ex. 11*, Woodward Dec. ¶ 7 (J.A. p. 600). It is clear that other senior officers within the Hampton Sheriff’s Office learned of Woodward’s protesting Perkins’ activity. *Id.*

22. In all years prior to 2009, each of the Appellants had provided very active support to the Sheriff in his various re-election and campaign fund-raising efforts. *Ex. 10*, Bland Dec. ¶ 1-5 (J.A. 595-596); *Ex. 6*, Carter Dec. ¶ 1-5 (J.A. 567-568); *Ex. 7*, Dixon Dec. ¶ 1-5 (J.A. 579-580); *Ex. 8*, McCoy Dec. ¶ 1-5 (J.A. 584-585); *Ex. 9*, Sandhofer Dec. ¶ 1-5 (J.A. 589-590); *Ex. 11*, Woodward Dec. ¶ 1-5 (J.A. 598-599). In prior years, each of them had taken an active role in putting out yard signs, working the polls on Election Day, handing out literature, selling tickets to fund-raising events, attending fund-raising events and performing virtually every element of campaign support service typically needed in any political campaign. *Id.*

23. In 2009, each of the Appellants declined to provide political support of any kind to Sheriff Roberts. *Id.*

24. Sheriff Roberts himself admitted that several of the Appellants (J.A. 414-416) provided him with political support in the past, but that he noted no such support from any of the Appellants in 2009. *Id.*

25. Each of the Appellants, except Sandhofer, had lengthy tenure with the Hampton Sheriff's Office ranging from 7 to 22 years. *Ex. 10*, Bland Dec. ¶ 1 (J.A. 595); *Ex. 6*, Carter Dec. ¶ 2 (J.A. 567); *Ex. 7*, Dixon Dec. ¶ 2 (J.A. 579); *Ex. 8*, McCoy Dec. ¶ 2 (J.A. 584); *Ex. 9*, Sandhofer Dec. ¶ 2 (J.A. 589); *Ex. 11*,

Woodward Dec. ¶ 1 (J.A. 598). Each of the Appellants had excellent performance histories with the Hampton Sheriff's Office. *Id.*

26. The Appellants' Memorandum in Opposition to Defendants' Motion for Summary Judgment contained a *seriatim* response to each of Sheriff Roberts' factual contentions which is incorporated here by reference. (J.A. 262-274).

### **SUMMARY OF ARGUMENT**

This suit alleged that Sheriff Roberts discharged the Appellants because they politically associated with his opponent's campaign, refused to associate with or support his and because certain of them actively spoke in favor of his opponent's campaign or against his. The allegations in the underlying Complaint state two separate First Amendment claims, each of which, standing alone, entitle the Appellants to relief: 1) a political affiliation claim under *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980) and 2) a claim for protected employee speech on a matter of public concern under *Pickering v. Board of Education of Township High School District*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983).

Under the *Elrod/Branti* standard, when a public employee holds a "confidential" position, a "policy making" position or holds a unique position of trust, his employer may be justified in discharging him because of his political affiliation or refusal to affiliate, but *only* if the employer can show that the political

affiliation is an appropriate and necessary job requirement for the effective performance of the office. *Branti*, 445 U.S. at 518.

The *Pickering/Connick* analysis of political expression claims involves a two phase assessment. The first question is whether the employee spoke on a matter of “public concern.” *Connick*, 461 U.S. at 147-48. If so, the court balances “the interests” of the employee, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering*, 391 U.S. at 568. In a First Amendment retaliatory discharge case the court must also determine “whether the employee’s speech was a substantial factor in the employee’s termination decision.” *McVey v. Stacy*, 157 F.3d 271, 277-78 (4<sup>th</sup> Cir. 1998).

None of the Appellants held a “policy making” position, a “confidential” position or a position of unique trust. Carter, McCoy and Dixon were jailors; they were not law enforcement officers. Their duties were custodial. Sandhofer was a civil process server. His duties were ministerial in nature; he was a not a law enforcement officer. All of the Appellants politically affiliated with the campaign of Sheriff Roberts’ opponent in 2009. Carter, McCoy, Dixon and Woodward openly expressed views either in support of Sheriff Roberts’ opponent (Carter and McCoy) or in opposition to Sheriff Roberts’ campaign (Dixon and Woodward).

All of the Appellants performed their duties in an exemplary fashion and had excellent performance records. Five of the six Appellants had lengthy tenures with Sheriff Roberts. They all were terminated immediately after the November 2009 election. There is a genuine issue of material fact as to whether their political affiliation and protected speech was a substantial factor in each of their discharges.

### **STANDARD OF REVIEW**

Dismissals under Fed. R. Civ. P. 56 are reviewed *de novo*. *M & M Medical Supplies and Services, Inc. v. Pleasant Valley Hospital, Inc.*, 981 F.2d 160, 163 (4<sup>th</sup> Cir. 1992). All facts and inferences must be viewed in the light most favorable to the non-moving party. *Bank of Montreal v. Signet Bank*, 193 F.3d 818, 826 (4<sup>th</sup> Cir. 1999).

### **ARGUMENT**

#### **A. Applicable Legal Standard**

This suit alleges that Sheriff Roberts discharged the Appellants because they failed to associate with his political campaign and because certain of them actively spoke in favor of his opponent or against his campaign. The allegations state two separate First Amendment claims, each of which, standing alone, entitle the Appellants to relief: 1) a political affiliation claim under *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980) and 2) a claim for protected employee speech on a matter of public concern under *Pickering v. Board of*

*Education of Township High School District*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). The first claim is being asserted by all Appellants. The latter claim is being asserted by Carter, Dixon, McCoy and Woodward, but not Sandhofer and Bland.

The Supreme Court held in *Elrod*, and reiterated in *Branti*, that the First Amendment prohibits dismissal of public employees because they are not “affiliated with or sponsored by” a certain political entity. *Branti*, 445 U.S. at 517, quoting *Elrod*, 427 U.S. at 350. There is only one exception to this rule: when political affiliation constitutes “an acceptable requirement for . . . government employment.” *Id.* Under this standard, when a public employee holds a “confidential” or “policy making” position, his employer *may* be justified in discharging him because of his party affiliation, but *only* if the employer can show that the political affiliation is an appropriate and necessary job requirement for the effective performance of the office. *Branti*, 445 U.S. at 518. Accordingly, “the ultimate inquiry is not whether the label ‘policy maker’ or ‘confidential’ fits a particular position; rather, the question is whether the hiring authority can demonstrate the political affiliation is an appropriate requirement for the effective performance of the public office involved.” *Id.* In the present case, even if there were a “policymaker” or “confidant” among the Appellants, it is still Sheriff

Roberts' burden to prove that political affiliation and loyalty are a necessary job requirement.

As to the Appellants' political expression claims, the *Pickering/Connick* analysis involves a two phase assessment to determine whether a public employee's speech is constitutionally protected. The first question is whether the employee spoke on a matter of "public concern." *Connick*, 461 U.S. at 147-48. If so, and in the instant case there appears to be no dispute that the issue involved a matter of public concern, the court balances "the interests of the employee, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

There is no doubt that discussion of a candidate's suitability for office and debate on their qualifications are squarely within the First Amendment's citadel. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976); see also *Roth v. United States*, 354 U.S. 476, 484 (1957). The First Amendment affords the broadest protection to such political expression in order to "assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth*, 354 U.S. at 484.

There has been some variation of these standards in cases involving deputy sheriffs. The Fourth Circuit first applied the *Elrod/Branti* standard to deputy

sheriffs in *Jones v. Dodson*, 727 F.2d 1329 (4<sup>th</sup> Cir. 1984). *Dodson* considered the claims of two deputy sheriffs who alleged they were dismissed by a sheriff because of their political affiliations and expressions. The court held that a discharge because of political affiliation could not be justified as a matter of law under the *Branti* test. *Dodson*, 727 F.2d at 1338. The court stated:

[W]e do not believe that the duties of deputy sheriffs, no matter what the size of the office, or the specific position of the power involved, or the customary intimacy of the associations of the office, or the undoubted need for mutual trust and confidence within any law enforcement agency, could be found to involve policy making related to partisan political interest and to involve access to confidential information bearing . . . unpartisan political concerns.

*Dodson*, 727 F.2d at 1338, citing *Branti*, 445 U.S. at 519-520 n. 14.

The Fourth Circuit partially retreated from *Dodson* in *Jenkins v. Medford*, 119 F.3d 1156 (4<sup>th</sup> Cir. 1997). In *Jenkins*, ten North Carolina deputy sheriffs – each of whom were law enforcement officers with general and immediate powers of arrest – brought suit against a newly elected sheriff alleging that he discharged them because they failed to associate themselves with his political campaign and because they actively spoke and campaigned for his opponent. In an 8-5 *en banc* decision, the Fourth Circuit criticized the *Dodson* court's failure to dissect and analyze the specific duties of the deputies involved. The court held that deputies who serve as law enforcement officers in North



Carolina fall within the narrow exception to the general rule of conferring First Amendment protection announced in *Elrod* and *Branti* and, as a result, their political affiliation and speech were not protected. *Jenkins*, F.3d at 1164-1165. It is clear in *Jenkins* that the criticisms of *Dodson* are, as a practical matter, limited to that decision's broad pronouncements that "no deputy sheriff can ever be a policymaker" or "confidant." *Id.* It is equally clear that the *Jenkins* decision is limited to "law enforcement officers" who patrol with general and immediate powers of arrest. *Jenkins*, F.3d at 1165. The *Jenkins* court stated:

We limit dismissals based on today's holding to those deputies actually sworn to engage in law enforcement activities on behalf of the sheriff. We issue this limitation to caution sheriffs that courts examine the job duties of the position, and not merely the title, of those dismissed. Because the deputies in the instant case were ***law enforcement officers***, they are not protected by this limitation.

In *Knight v. Vernon*, 214 F.3d 544 (4<sup>th</sup> Cir. 2000), the Fourth Circuit examined a fact situation far more similar to the case presented here. Ms. Knight, a jailor, did not claim that she engaged in affirmative political speech, rather she claimed that her failure to affirmatively support the incumbent sheriff got her fired after the election. The district court granted the sheriff summary judgment relying on *Jenkins* in holding that Ms. Knight, a jailor, had duties sufficient to bring her within the policy maker exception to the *Elrod/Branti* rule. *Knight v. Vernon*, 23 F. Supp. 2d 634, 646 (M.D.M.C. 1998).

The Fourth Circuit reversed the district court's granting of summary judgment to the sheriff. The Fourth Circuit noted that the responsibilities of a jailor are "routine and limited in comparison" to those of a deputy sheriff law enforcement officer. The court stated "[W]e noted in *Jenkins* that a deputy is a sworn law enforcement officer. This means that a deputy has the general power of arrest, a power that may be exercised in North Carolina only by an officer who receives extensive training in the enforcement of criminal law." *Knight*, 214 F.3d at 550. The court went on to note that "Ms. Knight was not out in the county engaging in law enforcement activities on behalf of the sheriff, nor was she involved in communicating the sheriff's policies or positions to the public." *Knight*, 214 F.3d at 550, citing *Jenkins*, 119 F.3d at 1164.

In dealing with the assertion that Ms. Knight "must have taken the same oath" as a deputy sheriff law enforcement officer, the court stated:

The record does not support such a conclusion. However, even if Ms. Knight did take such an oath, it would not change our decision. As we emphasized in *Jenkins*, we 'examine the job duties of the position' and Ms. Knight's duties as a jailor were essentially custodial. She simply lacked the special status of a deputy sheriff...

*Knight*, 214 F.3d at 551.

In *Knight*, the sheriff additionally argued that Ms. Knight did not proffer sufficient evidence on summary judgment to show that she was fired for political reasons. *Knight*, 214 F.3d at 551-552. The Fourth Circuit disagreed. The court

noted that the sheriff asked for Ms. Knight's political loyalty. It further noted that the sheriff's top officers used "shift meetings to solicit department employees" for various types of support for the sheriff. *Id.* The sheriff in *Knight* made affirmative statements that he would require Ms. Knight's support and adverse consequences could result if he did not get it. After he won the election and fired her, he attempted to claim that the firing was due to an unauthorized leak to the press regarding financial record keeping and financial practices within the sheriff's office. The Fourth Circuit held that on all these facts a reasonable jury could conclude that the reasons proffered by the sheriff for her firing were pretextual and that the real reason was political affiliation. The Fourth Circuit remanded for a full trial on Ms. Knight's First Amendment claims. *Knight*, 214 F.3d at 552.

**B. The Appellants Lacked Discretion and Their Duties Were Purely Ministerial.**

The cases presented by the Appellants are substantively far closer to *Knight* than *Jenkins*. Carter, Dixon and McCoy were unaware that they even had the power of arrest. They worked exclusively in the jail. Sandhofer's duties were just as restricted and ministerial. They were not law enforcement officers, they did not patrol. The Sheriff plainly admits that the deputies did not have immediate powers of general arrest. In fact, they never arrested anyone. None of the Appellants had a position requiring discretion, the keeping of confidences, communicating for the Sheriff in an official capacity or making policy.

**C. The Hampton Sheriff's Office was a Political Cauldron.**

The Hampton Sheriff's Office has been a highly political environment for years. The Sheriff has held meetings with his employees, primarily at shift change, to persuade employees to support him in various ways. His senior officers roamed the workplace at the height of the political season seeking employees to put out signs in the community, work the polls, distribute literature, sell and buy tickets to campaign events, etc.

The Sheriff has had little or no regard to violating Virginia policy and applicable law related to conducting campaign activities "on the clock"<sup>7</sup> and appears to have been in plain violation of the *Hatch Act*, 5 U.S.C. § 7321, arising from the Hampton Sheriff's Office receipt of federal money for the housing and transportation of federal prisoners. *See, e.g., Ex. 24*, Deborah Davis Dec. ¶¶ 2-5 (J.A. 890-891).

**D. Four of the Appellants Engaged in Clear, Protected Expressions of Political Support for Sheriff Roberts' Opponent.**

Nine separate witnesses, four non-parties and five parties, have testified in depositions and in declarations that Sheriff Roberts came to shift change meetings in late summer of 2009 and threatened employees about getting on Facebook and supporting his opponent. He made it clear that open opposition to him such as this would result in terminations. It is clear from the record that the Sheriff's senior

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<sup>7</sup> *See, Ex. 30*, p. 28 (J.A. p. 1113).

officers reported up the chain of command all observed political activity and leanings in the office. Major Richardson did it with respect to the cookout. Major Wells-Major did it with respect to the Facebook postings of Carter and McCoy. Bowden took Wells-Major's report and forwarded it to the Sheriff. Likewise, it is clear that Frances Pope reported David Dixon's remark at the polls up the chain of command as well. The record is replete with evidence that senior officers sought employees' support for the Sheriff on a routine basis and reported political opposition.

It is critical to note that the Sheriff himself, in his deposition, did not deny critical, salient facts. Speaking of the shift change speeches where he mentioned the "long train" and "short train" (a phrase he admits using), Sheriff Roberts testified "[I]t's possible that I could have mentioned Carter being on Adams' Facebook page . . . but I don't recall ever doing that." Nine people have testified that he did exhort employees not to get on Facebook supporting his opponent – no one has testified that he did not, not even him.

It is clear that Deputies Carter, Dixon, McCoy and Woodward made affirmative expressions of political support for Jim Adams that are protected under the First Amendment. Carter and McCoy expressed their support for Jim Adams on Facebook. They posted information on Adams' campaign Facebook page indicating that they "like[d]" Adams and they "friend[ed]" him on the page. More

specifically, one of the first pages of Adams' campaign Facebook page has a picture of Adams with the following statement immediately under his picture:

I am confident that through hands-on leadership, I can restore the Hampton Sheriff's Office to a healthy state with high staff morale, and increased focus on public safety, sound finances and accountability to those who elect me.

The next relevant, material statement under Adams' quote is "303 people like this." *Ex. 6, Carter Dec. (J.A. 576-577)*. On the very first line is "Daniel R. Carter, Jr.," with his Facebook icon which happens to be a picture on his wedding day. *Id.* The evidence from McCoy, McGee, Bowden and the Sheriff himself is that McCoy listed his name on Adams' campaign Facebook page indicating his support as well. This evidence must be viewed in the light most favorable to McCoy. The District Court's holding that "liking" a political candidate on Facebook is not protected speech is contrary to *Buckley* and *Roth, supra*, and simply inexplicable.

It is clear that this caused a significant buzz within the Sheriff's Office. The presence of Adams' Facebook page was reported all the way up the chain of command through Major Wells-Major, Col. Bowden and ultimately to the Sheriff. The Appellants have introduced the testimony from nine witnesses who attested to the Sheriff's statements at the shift change meetings clearly threatening employees if they went on Facebook supporting Adams.

It is clear that Sheriff Roberts knew that Carter and McCoy were on Jim Adams' campaign Facebook page. It is also clear that Sheriff Roberts and his most senior officers viewed their presence on Adams' campaign Facebook page as communicating their "support" for Adams. Why else would Sheriff Roberts threaten employees at the shift change meetings with termination if they got on Adams' Facebook page? Why else would he have made an angry approach to Carter right after his speech communicating his threats? Why else would they have had an angry conversation right after the speech? Why else would Sheriff Roberts have told Carter, on the same occasion, "You have made your bed, now you're going to lie in it?"

The Sheriff's conduct plainly indicates retaliatory animus that gives significant strength to each of the Appellants' claims. It should not be necessary for each Appellant to have been accosted in this manner for these events to provide support to each of their respective contentions that genuine issues of material fact exist on all issues. The Sheriff's obvious animosity is relevant to and provides significant support to all claims.

David Dixon told a campaign worker that she could throw Sheriff Roberts' campaign literature away. The campaign worker, Frances Pope, a deputy within the Hampton Sheriff's Office, was shocked. She reported the statement up the chain of command. Dixon's statement incensed the Sheriff. As a result, the

Sheriff terminated Dixon. He did so without anyone asking Dixon, a 13 year Deputy with an excellent performance record, what had actually happened. There is no dispute about that remarkable fact. A fact finder in this action could reasonably conclude that had Dixon told an Adams' supporter that he could throw Adams' literature away, that Sheriff Roberts would have taken no action. It was the substance of Dixon's speech indicating opposition to the Sheriff, and not the alleged invective, that caused Dixon's firing. This presents a material issue of fact for a jury.

Debbie Woodward complained and protested Lt. George Perkins' circulating a petition in support of Sheriff Roberts because Perkins was not a resident of Hampton. She related her complaints to Sgt. Sharon Mays, Sgt. John Meyers and Lt. George Perkins, among others. In talking to Sgt. Mays, Woodward learned that another non-resident of Hampton was circulating petitions. Woodward had various conversations in the executive suite about this matter. Most of the conversations were with Sgt. Mays. Sgt. Mays regularly had lunch with Major Wells-Major, Deputy Harper (who is Col. Bowden's sister), and Col. Bowden. Moreover, their offices were in the same general area in which these discussions were held. A fact finder could easily infer, on the totality of these facts, that Debbie Woodward's protests were viewed by Sheriff's Office senior officers as political speech against



Sheriff Roberts or in favor of Jim Adams' candidacy and that they were reported to the Sheriff.

**E. All of the Appellants Engaged in Protected Political Affiliation with Adams and Refrained from Political Affiliation with Roberts.**

Carter, McCoy and Sandhofer attended the cookout which was also attended by Adams. According to Major Richardson, it "did not look good" and appeared to be a "campaign event." The cookout was significant enough to be reported to Sheriff Roberts by Col. Bowden. *Ex. 1*, Robert Dep. 114-115 (J.A. 393-394). It is clear why this cookout is being discussed between Col. Bowden and Sheriff Roberts – it is precisely because they made the identical assessment made by Major Richardson – it appeared to them to be a "campaign event" and "it did not look good." In any event, it is clear that a jury could conclude that Sheriff Roberts bore animus against anyone associating or affiliating with Adams at what was clearly perceived to be a campaign event. Why else is a cookout the subject of inquiry for Major Richardson and the topic of discussion between Col. Bowden and Sheriff Roberts?

All of the Appellants refrained from providing the Sheriff with the political support they had provided him in the past. Appellants each provided significant support to Sheriff Roberts' re-election efforts prior to 2009. All of the Appellants were close to Jim Adams. Bland and Woodward were close to both Adams and

Deborah Davis, Adams' campaign treasurer. Moreover, Bland and Woodward were clearly part of the Sheriff's executive suite though they served only in clerical, administrative capacities. All of the Appellants had, prior to 2009, distributed campaign literature, manned polls on Election Day, sold tickets to campaign events, attended campaign events, put out yard signs and performed other significant services in support of Sheriff Roberts' re-election efforts. While one of the Appellants (Woodward) begrudgingly bought tickets to the Sheriff's golf tournament, none of them engaged in the full-throated active support they had provided in the past. Sheriff Roberts himself corroborates much of the substance of these allegations. (J.A. 414-417).

The totality of the facts in this case militate heavily for finding violations of both protected rights of free expression and political association. The Sheriff obviously held retaliatory and politically motivated animus. The evidence in the record of this is immutable. His intent to abridge rights of expression and political affiliation was manifest in the shift change meetings. At the very least, the evidence on this point creates an issue for trial. The work environment was imbued with politics and requirements of political loyalty. It is clear that the Appellants supported the Sheriff in the past but shifted their support to Jim Adams in 2009. This resulted in their refraining from engaging in support activities they

had engaged in the past for Sheriff Roberts. All of these factors combine to create issues of fact for trial.

**F. The Sheriff is Not Shielded by Qualified or Eleventh Amendment Immunity.**

Sheriff Roberts testified very clearly in his deposition that he understood that firing employees because of political affiliation or political speech was unlawful. Given his testimony, he cannot now claim qualified immunity. Roberts Dep. 111-113 (J.A. 390-392). In any event, the *Medford* and *Knight* decisions, among others, have provided significant illumination to inform a responsible Sheriff of his obligations in this regard. Eleventh Amendment immunity does not shield the Sheriff from claims for equitable relief. The Appellants' requests for reinstatement and lost pay are equitable claims that are not blocked by sovereign immunity.

**G. A Jury Issue Exists on the Issue of Retaliatory Termination.**

The Appellants had excellent performance histories. All of them, except Sandhofer, had been reappointed after elections at least once and many of them had been reappointed many times. Their tenure with the Sheriff's Office ranged from 7 to more than 22 years. Each of their performance evaluations had always been excellent. With the exception of very old counseling memoranda in the files of Woodward and Carter, there were no counselings or adverse documentation attributable to any of the Appellants. Sheriff Roberts' shift change speech, his obvious retaliatory animus, his originally citing office "harmony" as a reason for

their termination and his directly informing Carter that he would be fired immediately after the election, in addition to the myriad other facts in this case, clearly create an issue for trial on the issue of the Appellants' firings.

### **CONCLUSION**

For the foregoing reasons, the Appellants respectfully request that this Court reverse the District Court decision granting Sheriff B. J. Roberts summary judgment and remand this case for trial on all issues presented in Appellants' Complaint.

### **REQUEST FOR ORAL ARGUMENT**

The Appellants request oral argument.

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**CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

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Dated: July 30, 2012

/s/ James H. Shoemaker, Jr  
*Counsel for Appellants*

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on this 30<sup>th</sup> day of July, 2012, I caused this Brief of Appellants to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 30<sup>th</sup> day of July, 2012, I caused the required copies of the Brief of Appellants and Joint Appendix to be hand filed with the Clerk of the Court and a copy of the Joint Appendix to be served, via UPS Ground Transportation, upon counsel for the Appellee, at the above address.

/s/ James H. Shoemaker, Jr  
*Counsel for Appellants*